TABLE OF CONTENTS

	Page
Statement of the Case	1
Questions Presented	2
Reasons for denying Petition	3
Argument	3
Conclusion	10
Certificate	11

TABLE OF CASES

First Nat. Bank v. Cities Service Co., 391 U.S. 253, 20 L.Ed. 2d 569, 88 Sup. Ct. 1575	8
Lundeen v. Cordner, 456 F.ed 169 (CCA 8, 1966)	6
Miller v. Western Board of Adjustors, Inc., 427 F.2d 175 (CCA 9, 1970)	6
Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L.Ed. 2d 142, 80 S.Ct. 173	4, 6
Taylor v. Rederi A/S Volo, 249 F.Supp. 326 (1966)	7
U.S. v. Device Labeled "Cameron Spitler, etc." 261 F. Supp. 243 (1966)	7

OTHER AUTHORITIES

Rule 56 (e). Federal Rules of Civil Procedure	6

It is undisputed fact that Charlie Webster was employed aboard the Marlin Drilling Tender No. 3 between the dates of February 17, 1968 and August 3, 1968. His normal work period on the tender was seven days, followed by seven days off. It is unknown what Mr. Webster did on his time off.

At all times when Charlie Webster was living aboard the tender, his roommate was Mr. Arthur Winn. Mr. Arthur Winn has never had an active case of tuberculosis during his lifetime, and, on May 2, 1969, a medical examination indicated that no inflammatory disease such as tuberculosis could be found in Mr. Winn. It has been judicially noticed that tuberculosis is a contagious disease. A new infection can be contracted only by the passage of Tubercle Bacilli from one who has had an open or active case of tuberculosis to one who has never been previously affected by such a microbe.

QUESTIONS PRESENTED

Did the lower court err in granting summary judgment to the defendants when the only evidence presented was Mr. Webster's admission that the only unseaworthy condition aboard the vessel was the presence of spittle in an open can and the testimony of Dr. Morton Ziskind that such a condition could in no way be the cause of Mr. Webster's disease of tuberculosis?

REASONS FOR DENYING THE PETITION

1) The District Court was correct in accepting the affidavit of Dr. Morton Ziskind as evidence of material fact.

2) The District Court was correct in granting defendant's motion for summary judgment because there was no contested issue of material fact present.

3) The mere filing of a suit does not entitle a litigant to a trial by jury. There must be an issue of material fact present for the jury to try.

4) At no time did plaintiff produce any material facts to controvert the evidence presented by defendant, and under the facts presented, defendants were entitled to a summary judgment as a matter of law.

ARGUMENT

In their motion for summary judgment, defendants have presented three sworn statements to support their position. The first is the deposition of Charlie Webster in which he testified that he did not know of any condition aboard the Marlin Drilling Tender No. 3 which constituted an unsanitary or unseaworthy condition other than the open can into which Mr. Winn expectorated. In his answers to interrogatories, Mr. Webster again stated that the specific condition which allegedly caused the vessel to be unseaworthy was the open can of spittle. Finally, the defendants presented

the affidavit of Dr. Morton Ziskind which contained the following medical facts:

(1) Mr. Arthur Winn has never had an active case of tuberculosis during his lifetime, and on May 2, 1969, a medical examination indicated that no inflammatory disease such as tuberculosis could be found in Mr. Winn.

(2) Tuberculosis is a contagious disease and a new infection can be contracted only by the passage of Tubercle Bacilli from one who has an open case of tuberculosis to one who has never been previously affected by such a microbe.

(3) Any roommate, companion, or relative of Mr. Winn, who contracted tuberculosis, cannot attribute the cause of the disease to his physical proximity to Mr. Winn, who shows no signs of active pulmonary tuberculosis.

Plaintiff relies heavily on the case of *Sentilles vs. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 4 L.Ed. 2d 142, 80 S.Ct. 173. The case is clearly distinguishable. In brief, the facts of the case are as follows. While aboard ship, the plaintiff suffered a trauma which the jury found had aggravated a pre-existing tubercular condition. There was medical testimony to the effect that it was possible that the trauma caused an aggravation of the pre-existing tubercular condition. In reversing the 5th Circuit, and upholding the verdict of the jury, the Supreme Court found that there was support for the finding that trauma caused an ag-

gravation of tuberculosis, and the scope of judicial review was the reasonableness of that finding. Here the plaintiff suffered no accident or trauma while employed. At the time the motion for summary judgment was heard the only moving event used as a basis for plaintiffs' lawsuit was his connection with Mr. Winn.

In the present case, there is only the uncontradicted affidavit of Dr. Morton Ziskind, as well as his sworn deposition, that Mr. Winn could not have been the cause of Mr. Webster's contracting tuberculosis. There is also the statement of the plaintiff that the only unseaworthy condition of the vessel was the open can of spittle. Thus, as can clearly be seen from the above statements, the unseaworthy condition of the vessel as alleged by plaintiff could not have been the cause of his tuberculosis. The cause is unknown, and it is obvious that plaintiff cannot prove the cause.

When the motion for summary judgment along with supporting affidavits was presented to the Court by defendants, plaintiff produced no countervailing affidavits. If the matter was appropriate for summary judgment, and defendants contend that it was, the Federal Rules direct the Court to enter summary judgment in favor of the moving party.

> ". . . When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as other-

> wise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment if appropriate, shall be entered against him." Rule 56 (e). Federal Rules of Civil Procedure.

In the case of *Miller vs. Western Board of Adjusters, Inc.*, 427 F.2d 175 (9th Cir. 1970), the Court had an opportunity to discuss the above rule. Quoting from the case of *Lundeen vs. Cordner*, 356 F.2d 169 (8th Cir. 1966), the Court stated at page 176:

> "The law is equally clear that when a moving party presents an adequately supported motion for summary judgment (as was done herein) the adverse party must come forward with facts, not allegations, which controvert the necessary facts set forth in the moving party's case, Rule 56 (e) clearly spells out this duty on the sanction of suffering a summary judgment. (emphasis added)."

It must be noted that plaintiff has presented a long discussion of the rule in *Sentilles vs. Inter-Caribbean Corp.*, supra. As noted above, the case was decided by a jury when evidence was presented concerning the possibilities and probabilities of trauma causing a reactivation of latent tuberculosis. The Supreme Court held that if the verdict was reasonable, the reviewing court should not interpose its will in place of the jury's, simply because the court feels that its views are more reasonable.

The facts in the present case are quite different. Evidence in the form of sworn statements was presented which proved beyond doubt that plaintiff's tuberculosis could not have been caused as alleged. Instead of filing countervailing affidavits, plaintiff simply argued that he contracted tuberculosis during a certain period of time, and that tuberculosis could be possibly transmitted through the ventilation system of the vessel. Nowhere is any evidence presented as to what or who caused the plaintiff's tuberculosis.

Since the plaintiff did not come forward with countervailing affidavits, it must be assumed that there simply was no evidence to refute the position taken by the defendants.

A summary judgment does not have to preclude every possibility of how an incident happened. All that is required is that there be no genuine issue of material fact present. In the case of *U. S. vs. Device Labeled "Cameron Spitler, etc."*, 261 F. Supp. 243 (1966), the court stated at page 245:

> "Not every issue of fact, however genuine, precludes the entry of summary judgment. It is only genuine issues of material facts that have that effect."

It may also be noted that to be a genuine issue, the issue must be substantial. In the case of *Taylor vs. Rederi A/S Volo*, 249 F. Supp. 326 (1966), the court stated at page 328:

> "A 'genuine issue' is one that can be supported by substantial evidence. The whole purpose of summary judgment would be defeated if a case could be forced to trial by a mere assertion that a material issue is present without any showing of proof. Summary judgment is therefore a test to determine if there is evidence for a trial."

Furthermore, in the case of First Nat. Bank vs. Cities Service Co., 391 U.S. 253, 20 L.Ed. 2d 569, 88 Sup. Ct. 1575, this Honorable Court held:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." 391 U.S. 290.

There is no reason that a different rule should be used in the present case.

It is submitted that the district court did not err in finding that there was no issue of material fact. Plaintiff had an opportunity to present evidence to show the existence of the genuine issue of material fact at the time of summary judgment; this he did not do. Thus, the district court committed no error in granting a summary judgment based on the plaintiff's own

admissions concerning the seaworthiness of the vessel and the statements of medical fact contained in the affidavit of Dr. Morton Ziskind.

In summary, plaintiff has argued that he is entitled to a trial by jury because of the following allegations:

(1) That Charlie Webster was allegedly free from evidence of tuberculosis on December 27, 1967, and had positive findings of tuberculosis on August 13, 1968.

(2) That Arthur Winn or someone aboard the Marlin Tender No. 3 caused him to contract tuberculosis.

Defendants have proved beyond a doubt that Arthur Winn had no connection with the plaintiff's contracting tuberculosis. The plaintiff has presented no evidence to show that anyone else on the vessel had an active case of tuberculosis or caused the plaintiff to contract tuberculosis. So what remains is the allegation that plaintiff did not have tuberculosis in December, 1967 and was positive for the disease in August, 1968. This is certainly not evidence which would merit a trial of the case. A summary judgment may be used to test the evidence of an opposing party in order to determine the necessity of a trial. In the present case, plaintiff has shown no evidence of any genuine issue of material fact. Defendants call this Court's attention to the reasons for judgment of the lower court:

"At the time of the hearing plaintiff had produced no countervailing evidence but requested that he be allowed to depose Dr. Ziskind, which request was granted. Plaintiff now contends that the motion should be denied based upon Dr. Ziskind's deposition. We disagree. In his deposition, Dr. Ziskind never changed his position as stated in his affidavit. He still concludes that the plaintiff's tuberculosis was not contracted because of his physical proximity to Mr. Winn, who (on May 2, 1969) showed no signs of active pulmonary tuberculosis. (See deposition of Morton M. Ziskind, M.D.).

The court finds that there is no genuine issue as to any material fact in this case, and the movers are entitled to a judgment as a matter of law."

CONCLUSION

For the foregoing reasons, this petition for certiorari should be denied and the decision of the District Court and the affirmance by the Fifth Circuit Court of Appeal is correct on the basis that defendants are entitled to summary judgment as a matter of law. The application for writs should also be denied.

All of which is

Respectfully submitted,

ADAMS AND REESE

HENRY B. ALSOBROOK, JR.
847 National Bank of
Commerce Bldg.
New Orleans, Louisiana 70112
Attorney for Appellee

Of Counsel:
ADAMS AND REESE
New Orleans, Louisiana

CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Brief in opposition to the Petition for Certiorari have been served upon appellant, Charlie M. Webster, by depositing the same, postage prepaid, in the United States mail, addressed to Charles R. Maloney, 822 Richards Building, New Orleans, Louisiana 70112.

New Orleans, Louisiana, this ____ day of June, 1971.

HENRY B. ALSOBROOK, JR.